Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; BFI WASTE SYSTEMS OF NORTH AMERICA, INC.; BFI WASTE SYSTEMS OF MISSISSIPPI, LLC; AND WASTE MANAGEMENT OF MISSISSIPPI, INC.

Petitioners,

v.

PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY AND ITS BOARD OF COMMISSIONERS, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Several Mississippi counties and municipalities enacted flow control ordinances requiring that all municipal and commercial solid waste generated within those jurisdictions be transported to particular local facilities for disposal. Petitioners, waste disposal firms that participate in a national market for waste disposal services, challenged the constitutionality of these ordinances under the Commerce Clause. Against this background, the questions presented are:

1. Whether the Fifth Circuit erred in holding – in conflict with the First and Ninth Circuits – that, because petitioners did not transport waste from the enacting jurisdictions across state lines, they lacked standing under the "zone of interests" test to contend that the flow control ordinances unconstitutionally discriminate against interstate commerce.

2. Whether the Fifth Circuit erred in holding – in conflict with the Fourth, Sixth, Eighth, and Tenth Circuits – that a plaintiff bringing a Commerce Clause challenge under the balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), must show that the challenged law has the effect of discriminating against interstate commerce.

RULES 14.1 AND 29.6 STATEMENT

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were National Solid Wastes Management Association; BFI Waste Systems of North America, Inc.; BFI Waste Systems of Mississippi, LLC; Waste Management of Mississippi, Inc.; Pine Belt Regional Solid Waste Management Authority and its Board of Commissioners; Covington County, Mississippi; Jones County, Mississippi; Perry County, Mississippi; City of Petal, Mississippi; City of Laurel, Mississippi; City of Hattiesburg, Mississippi; and Mike Moore, in his capacity as Attorney General of Mississippi.

Pursuant to Rule 29.6, petitioners state that Waste Management of Mississippi, Inc., is wholly owned by Waste Management Holdings, Inc., which in turn is wholly owned by Waste Management, Inc. BFI Waste Systems of North America, Inc., is wholly owned by Browning-Ferris Industries LLC. The sole member of BFI Waste Systems of Mississippi, LLC, is Allied Waste North America, Inc.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. *infra*, 1a-20a) is reported at 389 F.3d 491. The opinion of the United States District Court for the Southern District of Mississippi (App., *infra*, 21a-33a) is unreported. The order of the court of appeals denying rehearing (App., *infra*, 34a-35a) is unreported.

JURISDICTION

The order of the court of appeals denying rehearing was entered on January 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

STATEMENT

This case involves a constitutional challenge to so-called "flow control ordinances," which require that all solid waste generated within the enacting jurisdictions be disposed of at particular local facilities. Petitioners are companies that dispose of waste that is generated within the relevant jurisdictions. Although petitioners participate in a national market for waste disposal services, the Fifth Circuit held in this case that, because petitioners did not transport waste from those jurisdictions across state lines at the time of trial, the "zone of interests" doctrine denies them standing to contend that the challenged ordinances discriminate against interstate commerce – a decision that the court acknowledged to conflict

with the holdings of two other circuits. The court below also held on the merits that a challenged regulation of commerce will be found to fail the familiar Commerce Clause balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), only if the regulation effectively *discriminates* against interstate commerce. This conclusion also conflicts with the holdings of other courts of appeals. Because the decision below departs from the approach taken by this Court, exacerbates significant confusion in the lower courts, and involves recurring issues of considerable practical importance, further review is warranted.

1. The respondents in this case are several Mississippi counties and municipalities that are members of the Pine Belt Regional Solid Waste Management Authority ("the Authority"). In 1996, the Authority issued bonds to finance the construction of a landfill and three "transfer stations," where waste could be unloaded pending transfer to the landfill for disposal. That same year, the Authority contracted with a local company to operate the landfill and transfer stations. The Authority raises revenue by collecting fees for the disposal of waste at these locations. In the event the Authority is unable to generate sufficient income to satisfy its bonded indebtedness, the member governments are obligated to make up the shortfall. App., *infra*, 2a-4a.

From the time the Authority commenced operations, the volume of waste processed at its facilities has fallen short of projections. Concerned that its revenues accordingly might be insufficient to satisfy its bond payment obligations, in 2002 the Authority directed its member governments to adopt flow control ordinances, which require that *all* municipal and commercial solid waste generated within those jurisdictions be transported to the Authority's landfill or transfer stations for disposal. See generally *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 386 (1994) (describing operation of flow control ordinances). Each member gov-

ernment in turn enacted an identical ordinance imposing this requirement. App., *infra*, 4a-5a. Noncompliance with the requirements of the ordinances is classified as a misdemeanor. *Ibid.*

Petitioners are companies that collect, process, and dispose of waste throughout the State of Mississippi and most of the United States (and a trade association representing those companies); at the time of trial, the waste they collected within the Authority's borders was transported to landfills located in Mississippi but *outside* of the Authority's boundaries. Petitioners have "numerous private contracts for the collection and disposal of commercial solid waste within the geographic boundaries of the Authority." App., *infra*, 23a. The flow control ordinances would interfere with this business, prohibiting petitioners "from disposing of solid waste collected within the Authority at their own facilities or any other public or private facility outside of the Authority." *Ibid.* Petitioners therefore commenced this suit in the Southern District of Mississippi against the Authority and its members, contending that the flow control ordinances violate the Commerce Clause of the U.S. Constitution.

2. Following a trial, the district court held that the ordinances are unconstitutional for two separate reasons. App., *infra*, 21a-33a. First, the court held the case controlled by *Carbone*, in which this Court ruled that a very similar flow control ordinance violated the Commerce Clause. The district court reasoned that here, as in *Carbone*, "[t]he Authority has drawn a ring around itself. Solid waste collected within that ring must be processed at its preferred transfer stations and landfill. These flow control ordinances prevent everyone except the favored local operator from processing solid waste collected within [the Authority's] boundaries and deprives outside access to the local waste disposal market." *Id.* at 29a.

The court added that "the defendants have failed to demonstrate that they had no other means to advance their admitted objective: the generation of adequate revenue to meet their financial obligations. In fact, the trial evidence showed that defendants could have promoted financial viability through increases in taxes, through the imposition of franchise fees or by increasing the amount of solid waste processed at its facilities by accepting solid waste from municipalities outside of the Authority." App., *infra*, 29a (footnote omitted).[1]

Alternatively, the court held that, even if the ordinances are deemed non-discriminatory within the meaning of *Carbone*, they must be invalidated under the *Pike* balancing test because they "impose[] an excessive burden [on interstate commerce] in relation to the putative local benefits." App., *infra*, 31a. Here, the district court relied on Justice O'Connor's concurring opinion in *Carbone*, which concluded that the flow control ordinance there at issue was unconstitutional under *Pike*. In reaching this conclusion, the district court found that "the Authority could have undertaken alternative steps to insure its economic interests without resorting to solid waste flow control. In addition, defendants introduced no evidence at trial which tended to

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[1] The district court rejected the defendants' contention that this case could be distinguished from *Carbone* on the ground that the waste disposal facilities here are publicly owned. The court noted that the Fifth Circuit has not recognized a constitutional difference between publicly and privately owned facilities and that, in any event, the private contractor here had been given "complete control over the operation and maintenance of the landfill and transfer stations" and "the Authority has given no indication that it intends to assume the operation of its facilities." App., *infra*, 30a. The court of appeals did not address the validity of this holding; the issue would be considered by that court on remand if petitioners prevail in this Court.

demonstrate that environmental or public health concerns were the motivating force behind enactment of these flow control ordinances." *Id.* at 32a. The court therefore held that, "even under the less rigorous *Pike* test, defendants' solid waste flow control ordinances fail." *Ibid.*

3. On appeal, the Fifth Circuit set aside the district court's judgment. App., *infra*, 1a-20a. The court of appeals' decision rests predominantly on a ground that the court raised *sua sponte*: it ruled that petitioners lack standing to argue that the ordinances unconstitutionally discriminate against interstate commerce. The court acknowledged that petitioners satisfy *constitutional* standing requirements because they have suffered an "injury (higher operating costs) that is traceable to the ordinances enacted by defendants and which would be remedied if we rule that the ordinances are unconstitutional." *Id.* at 11a. But the court held that petitioners run afoul of "prudential standing requirements" (*ibid.*) – and, in particular, that "plaintiffs' injury does not fall within the zone of interests to be protected by the dormant Commerce Clause with respect to ordinances that are alleged to facially discriminate against out-of-state economic interests." *Id.* at 13a.

That is so, the court reasoned, because "*these* plaintiffs do not ship (and, so far as the record shows, have never shipped) *any* waste they collect within the Region [governed by the ordinances] to any location outside of Mississippi, nor do they ship (and, so far as the record shows, have never shipped) any waste from outside of Mississippi to the Region." App., *infra*, 13a (emphasis in original).[2] Thus, "plain-

[2] The court noted that Stone County, Mississippi, has voted to join the Authority, although the contract between the two had not been finalized at the time of trial. The court also recognized that waste collected by one of the petitioners in Stone County is currently shipped to a landfill in Alabama. But the court declined to "consider the fact that waste from Stone County is actually shipped out

tiffs do not have standing to challenge the ordinances on the basis of a claim that they are facially discriminatory against out-of-state interests." *Id.* at 14a.

In so holding, the panel expressly recognized that

> [o]ur conclusion that plaintiffs do not meet the prudential standing requirement differs from that in two opinions from our sister circuits. *See On the Green Apartments LLC v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999). In *On the Green* and *Houlton,* the plaintiffs did not allege that they disposed of their waste out of state or that they had plans to do so. *On the Green*, 241 F.3d at 1241-40 [*sic*]; *Houlton*, 175 F.3d at 183. Nevertheless, both the Ninth Circuit and the First Circuit concluded that the plaintiffs met the prudential standing requirements.

App., *infra*, 14a n.16. But the Fifth Circuit "disagree[d] with the analysis" used by the Ninth and First Circuits. *Ibid.*

In contrast, the court of appeals held that petitioners *do* have standing to contend that the ordinances are unconstitutional under the *Pike* balancing test on the theory that they impose "an excessive burden on interstate commerce."[3]

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of state" because the County has not yet enacted a flow control ordinance and is not a party to this suit. App., *infra*, 13a n.14.

[3] In finding that petitioners have standing to make this argument, the court explained that, "[e]ven though plaintiffs do not ship any garbage collected in the Region out of state, they are engaged in interstate commerce, and *their* interstate commerce is allegedly burdened by the ordinances." App., *infra*, 15a (emphasis in original). The court noted that some of petitioners' contracts are negotiated on an interstate basis and that an increase in costs in Mississippi could affect petitioners' competitive standing in other states. *Id.* at 15a-16a & n.18.

App., *infra*, 15a. But the court proceeded to reject this constitutional argument on the merits. In the court's view, a state rule may be held invalid under *Pike* only if the challenging party "show[s] that the regulation has 'a disparate impact on interstate commerce.'" *Id.* at 18a (citation omitted). "The 'incidental burdens to which *Pike* refers are the burdens on interstate commerce *that exceed the burdens on intrastate commerce*.' * * * 'Where a regulation does not have this disparate impact on interstate commerce, then we must conclude that ... [it] has not imposed any incidental burdens on interstate commerce' and, therefore, that it passes the *Pike* test." *Ibid.* (citations omitted; ellipses and bracketed material added by the court) (emphasis added). The ordinances challenged here pass that test, the panel concluded, because "[t]he burdens imposed by the ordinances on interstate commerce * * * are no greater than those imposed on *intrastate* commerce." *Ibid.* (emphasis in original).

REASONS FOR GRANTING THE PETITION

This case arises in an area of great practical importance: many jurisdictions have enacted (or are contemplating enactment of) flow control ordinances, which have been the subject of a considerable volume of litigation. See generally *Carbone*, 511 U.S. at 407 (O'Connor, J., concurring in the judgment); *SSC Corp.* v. *Town of Smithtown*, 66 F.3d 502, 504-505 (2d Cir. 1995). The legal issues presented here, meanwhile, are recurring and very significant ones. Disagreement about the contours of the zone of interests test has led to an acknowledged conflict in the circuits. And questions about the application of the *Pike* standard arise with great frequency in a wide range of contexts. Because the resolution of these issues by the Fifth Circuit contributes to a growing disarray in the courts of appeals – and because the holding below is inconsistent with decisions of this Court – review of the decision below is in order.

I. THE FIFTH CIRCUIT'S NOVEL STANDING ANALYSIS DEPARTS FROM THE HOLDINGS OF OTHER COURTS OF APPEALS AND OF THIS COURT

Although petitioners operate in a national market for waste disposal services, the Fifth Circuit held that, because they did not move waste generated within the Authority's boundaries across state lines, they lack standing under the zone of interests doctrine to contend that the challenged flow control ordinances discriminate against interstate commerce. That holding conflicts with the decisions of other courts of appeals and contributes to a growing disarray in the lower courts about the meaning of the zone of interests requirement. This Court itself has recognized that "[t]he 'zone of interest' formula * * * has not proved self-explanatory." *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987). The result, as commentators have noted, is that "[t]he divergence of rules emanating from the Supreme Court appears to have left the lower courts somewhat rudderless and to have produced a system in which different categories of plaintiffs receive unfairly differing treatment." Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 341 (2004). This Court should grant review to resolve the acknowledged circuit conflict and provide guidance on this important, recurring issue.

A. The Fifth Circuit's Standing Decision Conflicts With That Of Other Courts Of Appeals

To begin with, as the court below itself recognized, its holding that petitioners lack standing squarely conflicts with the decisions of other courts of appeals. On this, the Fifth Circuit plainly was correct: other circuits have held the zone of interests requirement to be satisfied in circumstances identical to those in this case.

Thus, in *Houlton*, the First Circuit held that a local hauler of waste had standing to contend that a flow control ordinance discriminated against interstate commerce, explaining: "As a classic plaintiff asserting his own economic interests under the Commerce Clause – a constitutional provision specifically targeted to protect those interests – [plaintiff] avoids any concerns relative * * * to the zone of interests requirement." 175 F.3d at 183. Of particular relevance here, the First Circuit added that the plaintiff's "claim to standing is not damaged because he failed to allege that he hauled garbage out-of-state or planned to do so. In Commerce Clause jurisprudence, cognizable injury is not restricted to those members of the affected class against whom states or their political subdivisions ultimately discriminate." *Ibid.*

Similarly, in *On the Green Apartments* the Ninth Circuit held that a local hauler satisfied the zone of interests requirement and had standing to challenge Tacoma's flow control ordinance, even though the hauler sought to dispose of trash generated in Tacoma at landfills that were outside the city but *within* Washington State. See 241 F.3d at 1237, 1241. Writing for the majority, Judge O'Scannlain explained:

> [the plaintiff's] injury would be remedied if it could take its garbage outside the city. * * * As [plaintiff's] injury is thus related to the purposes underlying the Commerce Clause, it has satisfied the prudential component of standing with respect to its challenge to Tacoma's requirement that self-haulers tip at the city dump.

Ibid.[4]

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[4] The court below expressed the view that the Ninth Circuit erred by holding that the *On the Green* plaintiff fell within the zone of interests protected by the Commerce Clause "when the court concluded [on the merits] that the case *did not even implicate the Commerce Clause*." App., *infra*, 14a n.16 (emphasis in original).

Although not cited by the decision below, the Eighth Circuit is aligned with the First and Ninth. In *Ben Oehrleins & Sons & Daughter, Inc.* v. *Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), the plaintiffs challenging Hennepin County's flow control ordinance included "[l]ocal" waste haulers and landfills. *Id.* at 1376, 1378. There was no indication that all of these entities moved waste interstate (or received it from out-of-state). Yet the court found "no question that the *Oehrleins* plaintiffs, that is, various waste haulers and processors, have standing. * * * [W]e see no prudential barriers to standing for the *Oehrleins* plaintiffs." *Id.* at 1379. Courts in the Eighth Circuit understand this holding to mean that "the *Oehrleins* court must have been satisfied that *each* plaintiff had standing to challenge a restriction on out-of-state transportation of waste, regardless of whether it actively engaged in the activity or not." *Randy's Sanitation, Inc. v. Wright*

But it is the Fifth Circuit's reasoning that was confused. That the plaintiffs ultimately lost on the merits did not mean that their claims were outside the zone of interests "arguably" protected by the provision they invoked. That was the case, for example, in *Clarke*, in which this Court held that the plaintiff had standing to advance its claims before *rejecting* those claims on the merits. See 479 U.S. at 404-408. Cf. *Steel Co.* v. *Citizens for a Better Env.*, 523 U.S. 83, 89 (1998) (court has jurisdiction unless claim on merits is wholly insubstantial). The Ninth Circuit was well aware of this distinction: indeed, it held that waste generators – unlike waste haulers – *lacked* standing under the zone of interests doctrine to invoke the Commerce Clause in arguing that they should be permitted to haul their own waste. This was so because, in contrast to the hauler's challenge to geographic restrictions on the movement of waste, a generator's complaint that it "was forced to pay for waste disposal services it would like to provide for itself" invoked "interests [that] are, at best, marginally related to ... the purposes implicit in the dormant Commerce Clause." *On the Green*, 241 F.3d at 1240-1241 (internal quotation marks and citations omitted; ellipses added by the court).

County, 65 F. Supp. 2d 1017, 1024 (D. Minn. 1999) (emphasis added).

This acknowledged conflict in the circuits may be attributable to a certain lack of clarity in this Court's zone of interests case law. The Court itself noted, in its most recent significant decision in this area, that its "prior cases have not stated a clear rule for determining when a plaintiff's interest is 'arguably within the zone of interests.'" *Nat'l Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998). Indeed, while the Court has listed the zone of interests test "among other prudential standing requirements of general application" (*Bennett* v. *Spear*, 520 U.S. 154, 163 (1997)), virtually all of the decisions in which the Court has applied the test involved the review of agency action under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702. That fact has led the Court to suggest that "the test is most usefully understood as a gloss on the meaning of § 702." *Clarke*, 479 U.S. at 400 n.16. See *id.* at 395.

In contrast, the Court has provided essentially no guidance to the lower courts on application of the test in cases – like this one – that do *not* involve APA review, leaving commentators to question "what role remains for the zone of interests test in constitutional cases" and to note "the difficulty of developing a workable zone of interests analysis in constitutional cases that would add coherence and consistency to the law." Kelso & Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 146 (1996).[5] This history has

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[5] The Court appears to have invoked the zone of interests doctrine in a constitutional case only once, in *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977), holding that plaintiffs complaining of discriminatory taxation *were* arguably within the zone of interests protected by the Commerce Clause. Subsequently, however, while stating that "the decision that there

left much of the zone of interests doctrine "a mystery" and the law in a "confused state." Siegel, 92 GEO. L.J. at 317, 319. In these circumstances, further review plainly is in order.

B. The Decision Below Misunderstands The Purposes Of The Zone Of Interests Requirement

We submit that the Fifth Circuit's departure from the holdings of other courts of appeals is attributable to its failure to consider the purposes served by the zone of interests requirement. That prudential limit on standing is addressed to "the concern that the plaintiff be 'reliable,'" and thus "seeks to exclude those plaintiffs whose suits *are more likely to frustrate than to further statutory objectives*." *Clarke*, 479 U.S. at 397 n.12 (emphasis added). The zone of interests doctrine therefore is a basis for denying standing when "the plaintiff's interests are * * * marginally related to or inconsistent with the purposes implicit" in the relevant statute or constitutional provision. *Id.* at 399. This Court has emphasized that, in applying the test, it has "struck the balance in a manner favoring review" and that the zone of interests doctrine "is not meant to be especially demanding." *Id.* at 397, 399. Against this background, the court of appeals' holding that petitioners' discrimination argument falls outside the Commerce Clause zone of interests is wrong, for several reasons.

First, because the zone of interests requirement is designed to ensure that the plaintiff has a concrete interest in pursuing its challenge, a claim generally will fall outside the relevant zone of interests only "where the plaintiff is not it-

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was standing in *Boston Stock Exchange* was undoubtedly correct," the Court cautioned (without elaboration) that the zone of interests doctrine "is not a test of universal application." *Clarke*, 479 U.S. at 400 n.16.

self the subject of the contested regulatory action." *Clarke*, 479 U.S. at 399. That was the situation in the only case in which this Court has held a plaintiff to fail the zone of interests test. See *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517 (1991) (postal employees lack standing to challenge regulation suspending Postal Service monopoly over certain international operations). But here, of course, petitioners *are* directly regulated by the challenged flow control ordinances.

Second, petitioners unquestionably are "reliable" plaintiffs whose litigation of this case is much more likely to further than to frustrate the objectives of the Commerce Clause. Their goal is identical to that of entities that move waste interstate: all such businesses will benefit equally if limits on the free movement of waste generated within the boundaries of the Authority are removed. Petitioners thus "certainly have an interest" in enforcing the Commerce Clause anti-discrimination policy at issue here. *Nat'l Credit Union Admin.*, 522 U.S. at 493-494. As the Fifth Circuit recognized, petitioners "are engaged in interstate commerce" (App., *infra*, 15a); their business is part of a national market in waste disposal services, and there is every reason to believe that petitioners will benefit in the future from a rule invalidating limitations on the interstate movement of waste generated within the boundaries of the Authority. See generally *id.* at 13a n.14. Indeed, businesses like petitioners, which want to be able to respond immediately to changes in the market or in local conditions that make it desirable to send waste across state lines, have a concrete interest in the invalidation of rules that make the interstate transportation of waste illegal.[6] Petitioners therefore "are very reasonable candidates" to advance

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[6] One petitioner currently moves waste from within the boundaries of an Authority member in interstate commerce, but that member has not enacted a flow control ordinance.

Commerce Clause anti-discrimination arguments. *Clarke*, 479 U.S. at 403.

That is particularly so because this Court has never required a plaintiff asserting a claim of discrimination against interstate commerce to show that the challenged state law actually succeeded in discouraging such commerce. Instead, "[o]nce a state [law] is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992). See, *e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 578 (1997). Petitioners' argument therefore should not be barred simply because they cannot say that, absent the flow control ordinances, waste would immediately be transported out of state.

Third, the court of appeals' holding that petitioners have standing to argue "impermissible burden" under *Pike* but not "improper discrimination" under the Commerce Clause draws a distinction that is artificial and ultimately unmanageable. "[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike* v. *Bruce Church* balancing approach." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Yet the court below has attempted to draw a "clear line" that segregates the types of *arguments* that may be made in challenging such statutes. Perhaps because such a distinction is unworkable, we are not aware of any decision of this Court that uses prudential standing rules to limit the arguments that may be made by a plaintiff who concededly is entitled to invoke the Commerce Clause in a challenge to the constitutionality of a state law.

Indeed, in this respect the Fifth Circuit's holding is in severe tension with *Carbone* itself. The plaintiffs in *Carbone* were "in-town processors" that were "physically located *in*

Clarkstown." 511 U.S. at 404 (O'Connor, J., concurring in the judgment) (emphasis in original). See *id.* at 387-388 (majority opinion). Yet a central aspect of the Court's rationale in *Carbone* was that the ordinance "deprive[d] *out-of-state businesses* of access to a local market" (*id.* at 389 (emphasis added)); the Court held that "[t]he essential vice in laws of this sort" is that "*[o]ut-of-state* [processors] * * * are deprived of access to local demand for their services." *Id.* at 392 (emphasis added). See *ibid.* (ordinance left "no room for investment from outside"). Thus, although not directly addressing the standing issue, this Court quite plainly did not believe that the local plaintiffs in *Carbone* were precluded from advancing arguments that were inapplicable to those plaintiffs' immediate factual circumstances. The Court should grant review to address the Fifth Circuit's contrary conclusion here.

II. THE PANEL'S APPLICATION OF *PIKE* IS INCONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT

The court of appeals also went astray in its application of the *Pike* test. This Court has understood *Pike* to stand for the proposition that a state regulation with "'only incidental'" effects on interstate commerce will be invalidated if "'the burden imposed on such commerce [by the regulation] is clearly excessive in relation to the putative local benefits.'" *Edgar* v. *MITE Corp.*, 457 U.S. 624, 640 (1982) (quoting *Pike*, 397 U.S. at 142). The court of appeals, however, modified this test so that the balance between local benefits and the burden on commerce is immaterial unless "the challenging party" *also* is able to "show that the regulation has 'a *disparate impact* on interstate commerce.'" App., *infra*, 18a (quoting *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998) (emphasis added)). The court below thus held that

> [t]he "incidental burdens to which *Pike* refers are the burdens on interstate commerce *that exceed the burdens on intrastate commerce*." * * * "Where a regulation does not have this disparate impact on interstate commerce, then we must conclude that ... [it] has not imposed any incidental burdens on interstate commerce" and, therefore, that it passes the *Pike* test.

Ibid. (quoting *Automated Salvage Transport*, 155 F.3d at 75) (emphasis added). In several significant respects, however, the Fifth Circuit's holding that a party invoking *Pike* must show that the challenged law has a discriminatory effect on interstate commerce departs from the rule announced by this Court and directly conflicts with the holdings of other courts of appeals.

A. The *Pike* Test Does Not Require Proof Of A Disparate Impact On Interstate Commerce

At the outset, this Court has *never* indicated that a disparate impact on interstate commerce is any part of the *Pike* test. Quite the contrary: the Court consistently has stated that it is precisely when a state rule "regulates *evenhandedly*" that the *Pike* balancing approach comes into play. *Brown-Forman*, 476 U.S. at 579 (emphasis added). See *MITE Corp.*, 457 U.S. at 643, 644-646; *Pike*, 397 U.S. at 142. Perhaps the clearest proof of this pudding may be found in Justice O'Connor's concurring opinion in *Carbone*, in which she concluded that a flow control ordinance essentially identical to the ones challenged here was unconstitutional under *Pike* because "[e]ven a nondiscriminatory regulation may * * * impose an excessive burden on interstate trade when considered in relation to the local benefits conferred." 511 U.S. at 405 (O'Connor, J., concurring in the judgment). That was so even though the ordinance at issue did "*not* give more favorable treatment to local interests as a group as compared to out-of-state or out-of-town economic interests," instead pro-

viding that "in-town processors * * * and out-of-town processors [were] treated equally." *Id.* at 404 (emphasis added).[7]

The Fifth Circuit's contrary conclusion is logically insupportable. The court of appeals held that *Pike* balancing comes into play only when a state law has a differential impact on interstate commerce. But when a state law has the "practical effect of * * * discriminating" against interstate commerce, it is subject, *not* to the *Pike* test, but to the rule of virtual per se invalidity that governs discriminatory state regulations. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350-351 (1977). See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 281 (1987) (state tax that has a discriminatory effect will be struck down even if does "not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory"). The Fifth Circuit's holding thus would render the *Pike* test a nullity by making it applicable only in a category of cases for which it is wholly unnecessary.

B. The Fifth Circuit's Decision Conflicts With The Holdings Of Other Courts Of Appeals

Given this background, it is no surprise that the Fifth Circuit's approach is in the minority among the courts of appeals. That court is aligned with the Second Circuit, which agrees that *Pike* requires a showing

> that a statute enacted for a legitimate public purpose, although apparently evenhanded, actually imposes "burdens on interstate commerce that exceed the burdens on intrastate commerce," * * * and that *those excess burdens* on interstate commerce are "clearly excessive in relation to the putative local benefits * * *." "The statute, at a minimum, must impose a burden on interstate commerce

[7] The majority in *Carbone* found it unnecessary to reach the application of *Pike*. See 511 U.S. at 390.

> that is *qualitatively or quantitatively different from that imposed on intrastate commerce*." * * * Under the *Pike* test, "if no such unequal burden be shown, a reviewing court need not proceed further."

Freedom Holdings Inc. v. Spitzer, 357 F.3d 205, 217-218 (2d Cir. 2004) (citations omitted) (emphasis added). In the Second and Fifth Circuits, "[t]he bottom line is therefore that, under either the 'clear discrimination' or the '*Pike*' forms of analysis, 'the minimum showing required ... is that [the state statute] have a disparate impact on interstate commerce.'" *Id.* at 218 (citation omitted; ellipses and bracketed material added by the court). *Freedom Holdings* applied this understanding to reject a constitutional attack under *Pike* because the challenged laws "ha[d] no such disparate impact" and did not favor "any in-state commercial interest." *Ibid.*[8]

At least four other circuits, however, have taken a very different approach, applying *Pike* to invalidate evenhanded state laws whose burdens on interstate commerce greatly exceed their local benefits – even when those laws do *not* have a disparate impact on interstate commerce. In *U & I Sanitation* v. *City of Columbus*, 205 F.3d 1063 (8th Cir. 2000), for example, the Eighth Circuit addressed a municipal flow con-

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[8] See also *Automated Salvage Transp.*, 155 F.3d at 75 (relied upon by the Fifth Circuit at App., *infra*, 18); *Gary D. Peake Excavating, Inc.* v. *Town Board of the Town of Hancock*, 93 F.3d 68, 76 (2d Cir.) (challenged ordinance satisfies *Pike* test because it "applies equally to all waste, regardless of its point of origin. Therefore, the ordinance does not impose burdens on interstate commerce that exceed the burdens imposed on intrastate commerce."). The Seventh Circuit appears to apply a similar test. See *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) ("[u]nless the law discriminates against interstate commerce expressly or in practical effect, there is no reason to require special justification").

trol ordinance, very much like the ones at issue here, that did "*not* overtly discriminate against interstate commerce on its face, in its purpose, or through its effects." *Id.* at 1069 (emphasis added).[9] Under the Fifth Circuit's rule, that would have been the end of the analysis and the ordinance would have been upheld. But the Eighth Circuit invalidated the challenged ordinance because "the local interests that it serves do not justify the burden that it imposes upon interstate commerce." *Ibid.* Engaging in the balance mandated by *Pike*, the court found that the ordinance did little to advance local interests and that the municipality had alternative means to accomplish its purposes that would impose less of a burden on interstate commerce. *Id.* at 1069-1072. Particularly given the possibility that other localities might adopt similar flow control restrictions, the court explained that "the ordinance's interference with interstate commerce is 'clearly excessive' in relation to [its] local benefits." *Id.* at 1072. See also *R & M Oil & Supply, Inc.* v. *Saunders*, 307 F.3d 731, 735, 736 (8th Cir. 2002) (invalidating challenged law under *Pike*, despite absence of evidence that the law had a "discriminatory effect" or "places out-of-state distributors at a competitive disadvantage," because "there is clearly a burden [on interstate commerce] substantial enough to outweigh the *de mininis* putative local benefit of the law").

The Fourth, Sixth, and Tenth Circuits have used a similar analysis – and rejected the approach taken by the Fifth Circuit – in striking down (or reversing district court judgments upholding) state laws even though those laws did not have a disparate impact on interstate commerce. See *PSINet, Inc. v.*

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[9] Indeed the Columbus ordinance at issue in *U & I Sanitation* did not reach "garbage destined for out-of-state disposal." 205 F.3d at 1065. See *id.* at 1068-1069. Its effects therefore were effectively identical to the limits on the intrastate movement of waste addressed by the Fifth Circuit in its *Pike* analysis in this case.

Chapman, 362 F.3d 227, 240 (4th Cir. 2004) (even if challenged regulation of Internet were construed to reach only in-state web sites or sites having substantial contact with the regulating state, regulation is invalid under *Pike* "because the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers") (alternative holding);[10] *McNeilus Truck & Mfg., Inc. v. Ohio*, 226 F.3d 429, 444 (6th Cir. 2000) (even if statute is thought to be nondiscriminatory, "the lack of any significant local benefit that does not already exist means that the State * * * could not demonstrate that the benefits of the statute outweigh even an incidental burden on interstate commerce posed by the [challenged law]") (alternative holding); *Blue Circle Cement, Inc.* v. *Board of County Comm'rs*, 27 F.3d 1499, 1511-1512 (10th Cir. 1994) (agreeing with district court that challenged ordinance "regulates evenhandedly" and "confers no advantages on in-state entities," but reversing and remanding because lower court failed to apply *Pike* test); *A.C.L.U. v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (challenged law fails *Pike* balancing test) (alternative holding).

These conflicting standards often will determine the outcome of litigation: application of the Fifth Circuit's rule would have required the courts in each of the cases just discussed to reject the Commerce Clause challenges. Conversely, application in this case of the approach taken by the Eighth Circuit (as well as the Fourth, Sixth, and Tenth) would have resulted in invalidation of the challenged ordinances. This Court accordingly should grant review to resolve this conflict on a recurring and significant issue of constitutional law.

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[10] See also *Chambers Med. Techs of S.C., Inc.* v. *Bryant*, 52 F.3d 1252, 1261-1262 (4th Cir. 1995) (applying *Pike* test where challenged law "regulates evenhandedly and has only incidental effects on interstate commerce").

C. The Challenged Ordinances Should Have Been Invalidated Under *Pike*

Because it insisted on a showing of a discriminatory impact on interstate commerce, the Fifth Circuit failed to apply elements of the *Pike* test that, under a proper analysis, would have led to invalidation of the challenged ordinances. As Justice O'Connor explained in *Carbone*, under *Pike*

> "the practical effect of [the challenged ordinance] must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, [jurisdiction] adopted similar legislation."

511 U.S. at 406 (O'Connor, J., concurring in the judgment) (citation omitted; bracketed material added by the Court). Here, had the court of appeals engaged in this inquiry, it would have had to conclude that, if "localities in [other] States impose the type of restriction on the movement of waste that [the Authority] has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, pervasive flow control would result in the type of balkanization the Clause is primarily intended to prevent." *Id.* at 406. See *U & I Sanitation*, 205 F.3d at 1071-1072 (court must not look only at "the particular ordinance at issue and its effects upon the particular parties before us," but must assume "that all cities * * * enacted flow control ordinances like the one at issue").[11]

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[11] In light of its holding regarding petitioners' standing, the Fifth Circuit indicated that, in applying *Pike*, it would "ignore the fact that the ordinances would not permit [petitioners] to ship waste generated within the Region out of state." App., *infra*, 17a. For the reasons explained above in our discussion of standing, this aspect

In addition, as Justice O'Connor also noted in *Carbone*, analysis under *Pike* must consider whether the local purpose "can be achieved by other means that would have a less dramatic impact on the flow of goods." 511 U.S. at 405 (O'Connor, J., concurring in the judgment). Here, as in *Carbone*, the sole local interest is "to ensure the financial viability of the [waste disposal] facilit[ies]." *Ibid.* And as the district court expressly found (App., *infra*, 29a, 32a), in this case, as in *Carbone*, the local governments have alternative means to achieve this goal that do not impose any burden on interstate commerce. See 511 U.S. at 405-406 (O'Connor, J., concurring in the judgment); *U & I Sanitation*, 205 F.3d at 1070-1071. Under the balancing test mandated by *Pike*, the court of appeals accordingly erred in upholding the challenged ordinances.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted.

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of the court of appeals' analysis was wrong. But this mistake was independent of the court's more fundamental error in holding that the *Pike* balancing test applies only when the challenged law has a disparate impact on interstate commerce.

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